STATE OF MICHIGAN

COURT OF APPEALS

THAMMADI RAVIKANT,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
September 30, 2003

No. 238911
Oakland Circuit Court
LC No. 01-033117-CK

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

In this employment discrimination case, plaintiff filed a ten-count complaint against defendant relating to defendant's restriction of plaintiff's staff privileges. The trial court granted summary disposition to defendant of all plaintiff's claims. Plaintiff now appeals as of right. We affirm.

Plaintiff is a physician of East Indian descent licensed to practice medicine in Michigan. At the time of the adverse employment action in this case, plaintiff was about sixty years old and had been granted staff privileges at defendant hospital for the past twenty years. After the death of one of plaintiff's surgical patients, defendant conducted an extensive investigation and peer review, which resulted in the restriction of plaintiff's staff privileges. Plaintiff, thereafter, brought the present suit against defendant. Plaintiff's amended complaint alleged ten counts, including: Count I, racial discrimination in violation of MCL 37.2201(a); Count II, denial of public accommodation on the basis of race in violation of MCL 37.2302(a); Count III, racial discrimination in violation of MCL 333.21513(e); Count IV, racial discrimination in violation of the United States and Michigan constitutions; Count V, age discrimination in MCL 37.2201(a); Count VI, denial of public accommodation on the basis of age in violation of MCL 37.2302(a); Count VII, age discrimination in violation of MCL 333.21513(e); Count VIII, age discrimination in violation of the United States and Michigan constitutions; Count IX, detrimental reliance; and Count X, defamation.

Defendant thereafter filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and (C)(10), requesting dismissal of all plaintiff's claims on the grounds that (1) plaintiff was not defendant's employee, and thus, lacked standing to assert discrimination claims under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., (2) the doctrine of judicial non-review of private hospital staffing decisions precluded plaintiff's tort claims of promissory estoppel and defamation, (3) plaintiff expressly released defendant from liability arising from professional

review and corrective actions, (4) MCL 333.531 provides defendant immunity for peer review actions, (5) the right to practice medicine is not a service offered to the general public, so plaintiff's claims of denial of public accommodation fail, (6) the Public Health Code does not provide plaintiff a private cause of action, and (7) no private right of action exists for constitutional violations under the circumstances of this case and plaintiff has not alleged that defendant acted under the color of state law. Plaintiff responded, arguing that (1) summary disposition was premature at that time because discovery had not yet occurred, (2) plaintiff was not required to be defendant's employee to have a cause of action under the CRA, (3) plaintiff actually was defendant's employee under the economic reality test, (4) defendant was a public accommodation who discriminated against plaintiff, and (5) plaintiff's common law claims, which were non-contractual, were justiciable.

After oral arguments on the motion, the trial court granted defendant summary disposition and dismissed plaintiff's complaint with prejudice. In an oral opinion, the trial court found that (1) under the economic reality test, plaintiff was not defendant's employee and had no standing to proceed under the CRA, (2) the doctrine of judicial non-review precluded plaintiff's tort claims, (3) plaintiff failed to allege that defendant denied him access to a service available to the public, and therefore, the public accommodation counts failed as a matter of law, (4) the Public Health Code did not provide a private right of action, and (5) Michigan courts "decline to recognize a cause of action for money damages or other compensatory relief for past violations of the Equal Protection Clause of the Michigan Constitution, because the constitution provided the legislature the authority to create remedial measures to address civil rights violation."

Plaintiff now appeals, arguing that the trial court erred in granting defendant summary disposition. A trial court's decision to grant or deny summary disposition is reviewed de novo. *MacDonald v PKT Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Id*. In reviewing the motion, the trial court considers all affidavits, together with the pleadings, depositions, admissions, and documentary evidence submitted by the parties, in a light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The trial court should grant the motion if the evidence demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra*.

At the outset, we note that as a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000)(citation omitted). However, summary disposition may be proper before the completion of discovery where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Id*.

Plaintiff first argues that he stated a claim under the CRA, regardless of whether he is defendant's employee, because the CRA states that "individuals," and not just employees, are

protected from discrimination by any "person who has one or more employees." MCL 37.2201.[1] We disagree. This Court has recognized that an employment relationship is required in order for a plaintiff to state a claim under the CRA. See *Ashker v Ford Motor Co*, 245 Mich App 9, 15; 627 NW2d 1 (2001) (reaffirming the use of the economic reality test to determine whether a plaintiff could be considered an employee of the defendant for purposes of an CRA claim); *Seabrook v Michigan Nat'l Corp*, 206 Mich App 314, 316; 520 NW2d 650 (1994) (holding that the plaintiff could not bring an action under the CRA because she failed to establish an employer-employee relationship with the defendant corporation).

However, plaintiff contends that this Court should apply the reasoning in *Chiles v Machine Shop, Inc*, 238 Mich App 462, 468; 606 NW2d 398 (1999), which provides that an actual employment relationship is not necessary to have standing to sue under the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., as long as the defendant is in a position to "affect adversely the terms and conditions of an individual's employment or potential employment," to this case. Even if this Court applied the reasoning in *Chiles*, *supra*, plaintiff's CRA claims cannot be maintained because plaintiff offered no evidence that defendant was in a position to affect plaintiff's employment with his acknowledged employer, Sarala Ravikant, M.D., P.C. Further, defendant presented evidence that plaintiff still holds staff privileges with defendant and also had staff privileges at other hospitals in Pontiac when plaintiff reapplied for staff privileges with defendant. Although plaintiff's staff privileges with defendant have been limited, plaintiff did not present evidence that this limitation adversely affected his employment.

Alternatively, plaintiff argues that under the economic reality test, he is in fact defendant's employee, and thus, he has standing to sue defendant under the CRA. We disagree. Whether a company is a particular worker's employer is a question of law for the court to decide if the evidence on the matter is reasonably susceptible of a single inference. "Only where the evidence bearing on the company's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide." *Derigiotis v J M Feighery Co*, 185 Mich App 90, 94; 460 NW2d 235 (1990) (addressing the issue in the context of the workers' compensation act).

Michigan courts use the economic reality test to determine whether defendant was plaintiff's employer. The factors to be considered in applying the economic reality test are (1) control; (2) payment of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline. *Ashker*, *supra* at 12.

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[1] MCL 37.2201 provides, in part:

> As used in this article:
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> * * *
>
> (a) "Employer" means a person who has 1 or more employees, and includes an agent of that person.

In this case, plaintiff admitted to being an employee of Sarala Ravikant, M.D., P.C. Plaintiff further stated that he did not have a formal written employment contract with defendant. Defendant's Senior Vice-President and Medical Director stated in his affidavit that defendant (1) did not direct the manner in which plaintiff rendered medical care to his patients, (2) did not pay plaintiff for his services, (3) did not pay plaintiff's licensing fees, professional dues, insurance, taxes, or retirement benefits, (4) did not bill plaintiff's patients for plaintiff's services or collect plaintiff's fees, (5) did not control plaintiff's hours of work, other than scheduling for defendant's operating rooms and facilities, and (6) did not prevent plaintiff from holding appointments and privileges at other hospitals. The director concluded that defendant considered plaintiff an independent contractor.

On the other hand, plaintiff stated in his affidavit that he was subject to written requirements he considered contractual in nature, such as paying dues to defendant and abiding by defendant's reporting guidelines and rules, procedures, and bylaws. Further, plaintiff claimed he had been told that he was expected to do most of his surgeries using defendant's facilities. In addition, plaintiff was advertised as a "Beaumont doctor" and expected to perform any procedures related to referrals received as a "Beaumont doctor" at defendant's facilities. Plaintiff considers himself controlled by defendant's administration, and his billings are governed by the guidelines defendant negotiated with major insurance carriers.

We conclude that the facts presented by plaintiff and defendant are reasonably susceptible of the single inference that defendant is not plaintiff's employer. *Derigiotis*, *supra* at 94. While defendant requires a certain standard of care from plaintiff, as indicated by defendant's bylaws and Physician Handbook, defendant does not control the manner in which plaintiff performs his work, pay plaintiff, provide benefits to plaintiff, or dictate plaintiff's hours. Therefore, under the economic reality test, defendant is not plaintiff's employer.

Plaintiff next argues that he has the right to seek a civil action in court to remedy violations of his civil rights. Again, we disagree. Plaintiff's argument relies on the 1971 Michigan Supreme Court case of *Pompey v General Motors Corp*, 385 Mich 537; 189 NW2d 243 (1971), superceded by statute as stated in *Mack v City of Detroit*, 254 Mich App 498, 501; 658 NW2d 492 (2002).[2] However, this Court recently addressed the viability of *Pompey* in *Mack*, *supra* at 501-502:

> *Pompey*, *supra*, was decided under the now-repealed Fair Employment Practices Act (FEPA), MCL 423.301 *et seq.*, which prohibited race-based discrimination in private employment; however, the FEPA provided an aggrieved party with only administrative relief. The Court acknowledged the general rule that, when new rights or duties that did not exist at common law are created by statute, the remedy provided for enforcement of that right by the statute is

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[2] *Mack v City of Detroit*, 254 Mich App 498, 501; 658 NW2d 492 (2002) had not yet been released when plaintiff filed his appeal. However, the general rule is that judicial decisions are to be given full retroactive effect. *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997).

> exclusive. It also recognized that the rule presumptively applied because there was no preexisting, common-law remedy for employment discrimination. However, the Court noted that "the statutory remedy is not deemed exclusive if such remedy is plainly inadequate," and concluded that the plaintiff was not barred from bringing a civil suit to obtain full recovery for his damages. Thus, cumulative remedies were permissible under the FEPA because the act created new rights but itself did not provide for a civil cause of action to enforce those rights. In fact, all the comparable statutes mentioned in the discussion in *Pompey* shared this deficiency.
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> In contrast, the remedies provided under the current Civil Rights Act are fully adequate. The act establishes the right to file a civil cause of action to recover damages and obtain injunctive relief, in addition to the right to initiate administrative proceedings before the Civil Rights Commission. MCL 37.2801(1). Therefore, the justification for allowing cumulative remedies for civil rights violations found in *Pompey* no longer exists, and the general rule with regard to the exclusivity of statutory remedies applies. This conclusion is supported by the fact that the current Civil Rights Act "limits complaints to causes of action for violations of the act itself." [Citations omitted.]

Therefore, plaintiff's individual claims regarding the alleged violations of his civil rights are precluded because the CRA provides the exclusive remedy.

Likewise, plaintiff's claims under the Public Health Code, MCL 333.21513(e),[3] are precluded because the Code (1) does not expressly create a private cause of action, and (2) provides an adequate means of enforcing its provisions. See *Mack*, *supra* at 501-502. The provisions of the Code that provide this means of enforcement are MCL 333.20176, MCL 333.20177, and MCL 333.20199.[4] The Code contains no provision allowing plaintiff to sue defendant.

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[3] MCL 333.21513(e) provides:

> (e) After December 31, 1989, [the owner, operator, and governing body of a hospital licensed under this article] shall not discriminate because of race, religion, color, national origin, age, or sex in the operation of the hospital including employment, patient admission and care, room assignment, and professional or nonprofessional selection and training programs, and shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry.

[4] MCL 333.20176 provides, in part:

> (1) *A person may notify the department of a violation of this article* or of a rule promulgated under this article that the person believes exists. The
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> (continued…)

Plaintiff next argues that the trial court erred in dismissing plaintiff's common law claims of detrimental reliance (i.e., estoppel) and defamation because the doctrine of judicial non-reviewability of private hospital staffing decisions is limited to contract claims. While plaintiff is correct regarding the applicability of the doctrine of judicial non-reviewability of private hospital staffing decisions being limited to contract claims, his common law claims are still precluded.

Under Michigan law, a private hospital is empowered to appoint and remove its members at will without judicial intervention and has the right to exclude any doctor from practicing therein. *Long v Chelsea Community Hosp*, 219 Mich App 578, 586; 557 NW2d 157 (1996); *Hoffman v Garden City Hosp-Osteopathic*, 115 Mich App 773, 778-79; 321 NW2d 810 (1982). However, this Court stated, in *Long*, *supra* at 586, that "[t]he above law is limited to disputes that are contractual in nature." This Court then addressed the applicability of this doctrine regarding a claim of estoppel:

> Regarding plaintiff's promissory estoppel claim, a claim of promissory estoppel is akin to a contract claim. Therefore, the rules from *Sarin [v Samaritan General Hosp*, 176 Mich App 790; 440 NW2d 80 (1989)] and *Hoffman*, *supra*, where this Court has expressed its reluctance to review a private hospital's staffing decisions, preclude review of this claim. [*Long*, *supra* at 588-589 (citation omitted).]

(…continued)

> department shall investigate each written complaint received and shall notify the complainant in writing of the results of a review or investigation of the complaint and any action proposed to be taken. Except as otherwise provided in sections 20180, 21743(1)(d), and 21799a, the name of the complainant and the charges contained in the complaint are a matter of public record. [Emphasis added.]

MCL 333.20177 provides:

> Notwithstanding the existence and pursuit of any other remedy, the director, without posting a bond, may request *the prosecuting attorney or attorney general to bring an action in the name of the people of this state* to restrain, enjoin, or prevent the establishment, maintenance, or operation of a health facility or agency in violation of this article or rules promulgated under this article. [Emphasis added.]

MCL 333.20199 provides, in part:

> (1) Except as provided in subsection (2) or section 20142, *a person who violates this article or a rule promulgated or an order issued under this article is guilty of a misdemeanor, punishable by fine* of not more than $1,000.00 for each day the violation continues or, in case of a violation of sections 20551 to 20554, a fine of not more than $1,000.00 for each occurrence. [Emphasis added.]

Therefore, plaintiff's estoppel claim may not be reviewed under the doctrine of judicial non-reviewability of private hospital staffing decisions.

Plaintiff's claim for defamation is precluded because plaintiff signed a release relieving defendant and its employees from "any and all liability for their acts performed in good faith and without malice in the investigation, consideration, and evaluation of my reappointment . . . ." Further, defendant's bylaws contain express conditions regarding plaintiff's exercise of staff privileges relating to defendant's immunity from civil liability. Finally, MCL 331.531, the Public Health Code, provides, in part:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
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> * * *
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> (3) *A person, organization, or entity is not civilly or criminally liable*:
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> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.
>
> (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.
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> (4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.
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> (5) An entity described in subsection (2)(a)(v) or (vi) that employs, contracts with, or grants privileges to a health professional licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, *shall* report each of the following to the department of consumer and industry services not more than 30 days after it occurs:
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> (a) Disciplinary action taken by the entity against a health professional licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, based on the health professional's professional competence, disciplinary action that results in a change of the health professional's employment status, or disciplinary action based on conduct that adversely affects the health professional's clinical privileges for a period of more than 15 days. As used in this subdivision, "adversely affects" means the reduction, restriction, suspension, revocation, denial, or failure to renew the clinical privileges of a health professional by an entity described in subsection (2)(a)(v) or (vi).
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> (b) Restriction or acceptance of the surrender of the clinical privileges of a health professional under either of the following circumstances:

(i) The health professional is under investigation by the entity.

(ii) There is an agreement in which the entity agrees not to conduct an investigation into the health professional's alleged professional incompetence or improper professional conduct.

(c) A case in which a health professional resigns or terminates a contract or whose contract is not renewed instead of the entity taking disciplinary action against the health professional.

(6) Upon request by another entity described in subsection (2) seeking a reference for purposes of changing or granting staff privileges, credentials, or employment, an entity described in subsection (2) that employs, contracts with, or grants privileges to health professionals licensed or registered under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, *shall* notify the requesting entity of any disciplinary or other action reportable under subsection (5) that it has taken against a health professional employed by, under contract to, or granted privileges by the entity. [Emphasis added.]

Since plaintiff premises his defamation claim on defendant's reports to the National Practitioner Data Bank, which appear to be privileged communications under MCL 333.531, defendant is immune from liability unless plaintiff can show that defendant acted with actual malice. MCL 333.531(4); *Veldhuis v Allan*, 164 Mich App 131, 136-137; 416 NW2d 347 (1987). Here, plaintiff offered no evidence that defendant acted with actual malice, i.e. with knowledge of the report's falsity or with reckless disregard of its truth or falsity, when reporting plaintiff's limitation of staff privileges. *Id*. Even if plaintiff did not agree with the conclusion reached by defendant, defendant factually reported the result of the investigation leading to the reduction of plaintiff's privileges.

Plaintiff also argues that it was unlawful for defendant, a public accommodation, to deny plaintiff staff privileges. Again, we disagree. MCL 37.2302(a) provides:

Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

As defendant notes, defendant is a public accommodation for the general public to receive medical care, but it is not a place of general accommodation for the medical profession to practice medicine. Defendant must necessarily be careful regarding the qualifications and competency of the physicians to whom it grants staff privileges. And, as noted, *supra*, defendant's staffing decisions are not judicially reviewable.

Finally, with regard to plaintiff's claim that summary disposition was prematurely granted, we find that the trial court's grant of summary disposition before the completion of discovery was proper in this case. As discussed, *supra*, there was no factual dispute regarding

the factors considered under the economic reality test used to determine whether plaintiff was defendant's employee or an independent contractor. Since the trial court properly determined that plaintiff was an independent contractor, and only an employee may raise claims under the CRA, plaintiff's disparate treatment claims fail as a matter of law. Further, plaintiff's other claims fail as a matter of law, and additional factual findings were not necessary to resolve the issues presented.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra